MISCELLANY.

Expert Medical Testimony Based on Statements to Physician.—In St. Louis & S. F. R. Co. *v.* McFall, in the Supreme Court of Oklahoma (February, 1917, 163 Pac. 268), it was held, according to the syllabus by the court, that "a physician who has examined the patient (so far after the accident that his statements to the patient cannot be said to be a part of the res gestae) for the purpose of testifying as an expert, can base his opinion on the subjective, together with the objective, symptoms of the patient, relying on a history of the case, including the fact of the accident, as a circumstance upon which he came to his conclusion."

Commenting upon this ruling, it is said in an editorial note of the case in the Michigan Law Review for June, 1917, at page 670:

"The above case takes an extremely liberal view, making no distinction between an attending physician and one examining for the express purpose of testifying for the plaintiff. There are cases in Alabama, California, Indiana, Massachusetts, New Jersey, Texas, Vermont and Wisconsin holding with the instant case. They go on the theory that a history of the case is usually necessary to reach a correct intelligent diagnosis, which is as important in the case of an expert witness who is to render an opinion as for an attending physician who is to administer medicine. (See Quaife *v.* Chicago & N. W. R. R., 48 Wis. 513; Missouri, K. & T. R'y *v.* Rose, 19 Tex. Civ. App. 470; People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315.) A number of states allow past history as basis of the opinion when stated to an attending physician, but exclude it when given to a physician for the express purpose of qualifying him to testify, on the theory that in the latter case the plaintiff is liable to make dangerous self-serving statements. (See Hintz *v.* Wagner, 25 N. D. 110, 140 N. W. 729; Grand Rapids & Ind. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Darrington *v.* N. Y. & N. Eng. R. Co., 52 Conn. 285, 52 Am. Rep. 590; James Edward *v.* Illinois Central R. R., 161 Ill. App. 630; Divine *v.* Rothchild, 178 Ill. App., 13.) Statements made to a physician called to treat a patient are usually very dependable, for the patient is anxious to give the physician a true version of the history of the case and of his present condition to enable the physician to make a correct diagnosis. But statements made to a physician called for the purpose of qualifying him as an expert witness are very apt to include all that is favorable to the plaintiff's case and exclude all that is detrimental. Besides, there is always the possibility that the patient has given a fraudulent version of his case. There is a tendency to make statements to such a physician strongly self-serving. A few states hold that a physician may base his opinion both on objective symptoms and on statements of present pains and sensations, but not on statements of past symptoms (Williams *v.* Great

Northern R. Co., 68 Minn. 55, 70 N. W. 860). In the following jurisdictions the statement of the past history of the case is held hearsay and inadmissible: The United States courts, Florida, Georgia, Kansas, Kentucky, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Carolina and South Carolina."

The New York Court of Appeals in People *v.* Murphy (101 N. Y. 126), took a contrary view to that of the Oklahoma Court and held that it was error, upon the trial of an indictment for an abortion, to permit a physician who, after the commission of the alleged crime, attended upon its alleged subject, to give his opinion as a medical expert that the crime had been committed, founded upon what he had observed as to the physical condition of the woman and upon her narrative of the facts, it appearing that she was alive at the time of the trial. In the course of the opinion, Judge Finch, speaking for an undivided court, remarked: "So that the opinion of the expert that a crime had been committed, founded upon the narrative of the woman of previous facts, which narrative was itself inadmissible and remained undisclosed, was given to the jury. Necessarily it carried with it damaging inferences of what that narrative in fact was, and drove the accused to the alternative of omitting all cross-examination as to the concealed basis of the opinion, or admitting inadmissible evidence."

The reasoning and conclusions of the New York court are even more convincing where a physician is offered as a witness in favor of a plaintiff in a civil suit than where he testifies, partly relying upon the history of the case given by the prosecutrix, or the victim, in a criminal prosecution. The motives for uttering self-serving declarations are, if anything, stronger in a civil case, thus rendering expert evidence founded upon hearsay which is not res gestæ more clearly objectionable.

In Lambertson *v.* Consolidated Traction Co., 60 N. J. L. 452, 38 Atl. 683, it was held that declarations of a party to a physician, not made for the purpose of treatment, but for the purpose of leading a physician to form an opinion to which he could testify as an expert witness in a personal injury suit were inadmissible.

Speaking of declarations of a patient made to his physician for the purpose of treatment, the court said: "While such declarations partake of the nature of hearsay, they derive some credibility, beyond that of hearsay, from the fact that the patient expects his physician or surgeon to be guided by them in administering remedies, and so the patient has an incentive, beyond the ordinary obligation, to tell the truth. But when such declarations are made, not for the purpose of treatment, but for the purpose of leading the physician or surgeon to form an opinion to which he may testify as a witness for the declarant, not only is this reason for credibility absent, but,

instead, self-interest becomes a motive for distortion, exaggeration, and falsehood."

As was pointed out in the opinion: "The exclusion of a party's declarations made for the purpose of qualifying an expert to testify on his behalf will not unduly interfere with the evidence of expert witnesses. These witnesses may state to the jury the grounds of their opinion so far as their expertness has discovered them; but, outside of that, the grounds must be disclosed by other evidence; and, upon the grounds thus laid, hypothetical questions may be framed on which the opinion of experts can be received." This is believed to be the correct rule.

In International & G. N. R. Co. *v.* Boykin, 32 Tex. Civ. 72, 74 S. W. 93, the admission of testimony of an attending physician as to the patient's statement of the injury and its result was held reversible error. The court said: "Statements made to a physician as to past suffering are no more admissible as evidence in favor of the injured party than if they had been made to some other person. St. Louis S. W. Ry. Co. *v.* Martin (Tex. Civ. App.), 63 S. W. 1089."

In Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, it was held reversible error to admit testimony of a physician as to the history of the injury detailed to him by the plaintiff, where he was consulted after the action was commenced for the sole purpose of testifying on the trial. The court said: "Whatever may be the rule as to the admissibility of the statements made by a party when consulting a physician or surgeon for the purpose of obtaining advice or treatment for his disease or injury, we are clear that, when such statements are made by the party, after action commenced, to an expert, for the sole purpose of calling such expert as a witness for himself on the trial of the action, to give an opinion as to the nature of his complaint or injury, and its connecton with certain alleged causes, such statements are inadmissible in his own behalf."

The question does not seem to have arisen in Virginia or West Virginia, although it was ruled in Livingston *v.* Commonwealth, 14 Gratt. 592, followed in McMechen *v.* McMechen, 17 W. Va. 683, that any question to or testimony by an expert which involved an opinion of the credit of the witnesses or the truth of the facts testified to was improper.

The sound doctrine is believed to be that embodied in the quotations above from the New Jersey case of Lambertson *v.* Consolidated Traction Co.

C. E. S., Jr.

Classical Definition of Broker.—In Ross *v.* Moskowitz (Civ. App.), 95 S. W. 86, Justice Neil defined a broker as "a kind of go-between those who hath property to sell and those who hath money to buy,

whose business makes one as industrious in bringing about a trade between others as Ramsey Sniffle was in pulling off a fight to which he was never a party, whose own business is the business of other men, which makes him know more about what one man should do with his property and another with his money than the man himself, who is always contriving and striving to bring others together, nolens volens, in a trade, and, who like Todgers, 'can do it for a consideration,' which the law allows as commissions.'"

Expression of Advocate's Personal Opinion to Jury.—The general rule is stated in Judge Sharswood's work on Professional Ethics that an advocate ought not "to throw the weight of his own private opinion into the scales in favor of the suit he has espoused. If that opinion has been formed on the statement of facts not in evidence it ought not to be heard—it would be illegal and improper in the tribunal to allow any force whatever to it; if on the evidence only it is enough to show from that the legal and moral grounds on which such opinion rests."

In an article on Oratory in Scribner's Magazine for June, 1901, Hon. George F. Hoar, speaking of advocacy, used the following language:

"The question in the American or English court is not whether the accused be guilty. It is whether he be shown to be guilty by legal proof of an offense legally set forth. It is the duty of the advocate to perform his office in the mode best calculated to cause all such considerations to make their due impression. It is not his duty or his right to express or convey his individual opinion. On him the responsibility of the decision does not rest. He not only has no right to accompany the statement of his argument with any assertion as to his individual belief, but I think the most experienced observers will agree that such expressions, if habitual, tend to diminish and not to increase the just influence of the lawyer."

There are many reasons for the exclusion of advocates' personal convictions. Among them are the considerations that the opinion of an eminent and experienced practitioner would be apt to count for more than that of a lawyer of inferior caliber who was opposed to him; that if the custom of expressing individual opinions became established jurors would always expect them and perhaps attach significance if they were withheld; that on this account advocates who feared that they might not be able, conscientiously, to say that they believed defendants to be innocent would refrain from appearing for them. The true function of an advocate is to make the facts themselves speak.

An exception to the general rule was shown by the decision of the Supreme Court of Washington in State *v.* Wright (July, 1917, 166 Pac. 645), where it was held that the remark of a prosecuting attorney in his argument to the jury that he fully believed the defendant

guilty or he would not have brought the case to trial for a second time did not constitute misconduct where it was provoked by and in answer to an insinuation of the defendant's counsel that the case had not been dismissed after the disagreement of the first jury because of the district attorney's lack of courage. It would, indeed, seem that under the circumstances the statement was not only not error, but was entirely proper. On this point the court said in part:

"It is argued by the appellant that this statement of the prosecuting attorney constitutes reversible error, citing a number of cases from this court, among them being that of Rangenier *v.* Seattle Electric Co. (52 Wash. 401, 100 Pac. 842) and State *v.* Armstrong (37 Wash. 51, 79 Pac. 490), where we said:

'It is no part of the duty of the advocate to obtrude his personal opinion upon the jury, either as to the veracity of a witness or the weight of the evidence.' And 'While it is improper for a prosecuting attorney in argument to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.' A number of other cases are cited to show that it is no part of the duty of the prosecuting attorney to indicate his personal opinion to the jury. The remark objected to was brought about by what had theretofore been said by counsel for the defense, in which the prosecuting attorney was charged with not having the courage to give the appellant his liberty. Counsel insinuated by this remark that the prosecuting attorney did not believe the appellant was guilty, but did not have the courage to dismiss the action. Thereupon the prosecuting attorney answered by saying that he fully believed the defendant guilty or he would have brought him to trial.

'Remarks of the prosecuting attorney which ordinarily would be improper are not ground for exception if they are provoked by defendant's counsel and are in reply to his statements' (12 Cyc., 582).

We are satisfied that this is the correct rule, and, since the remark of the prosecuting attorney was called forth and provoked by remarks of counsel for the defense, the remark made was not error." —N. Y. Law Journal.